GOH PENG MENG v. PUBLIC PROSECUTOR.

[A. Cr. J. (Callow J.) February 25, 1948]

[Malacca — Criminal Appeal No. 24 of 1947]

Penal Code, ss. 411 and 414 — Dishonestly retaining stolen property — Proof of possession — Joint possession.

In this case the appellant had been convicted together with another person for dishonestly retaining stolen property. The evidence showed that the Police after forcing their way to a house at night found the stolen property in the house. The appellant and the other person were also found in the house, the appellant being up the roof with feet on a rafter and grasping a pole. One of the grounds of appeal was that the prosecution had failed to prove that the property was in the exclusive possession of the appellant.

Held: (1) in a charge of dishonestly retaining stolen property the prosecution must prove that the property in question was in the exclusive possession of the accused and the mere fact of presence in a house where stolen property is found cannot amount to possession; (2) in this case the surrounding circumstances were sufficient to show that the appellant and the other person were in joint possession of the property found and therefore the appeal must be dismissed.

Cases referred to:—

(1) *R. v. Cordy* Russell on Crimes 5th Edition Vol. 2 p. 483.
(2) *R. v. Wiky* 4 Cox 412.
(3) *Queen-Empress v. Muhamed Ali Shet* 19 M.L.T. 301.
(4) *Ram Charan* (1933) A.L.J.R. 1388.
(5) *Bashir Ahmad* 22 O.C. 256.
(6) *R. v. Flatman* 8 Cr. App. R. 256.
(7) *R. v. Savage* (1906), 70 J.P. 36.
(8) *R. v. Hari* 6 B.L.R. 887, 891.
(9) *Emperor v. Budh Lal* (1907), I.L.R. 29 All. 598.

Cur. Adv. Vult.

MAGISTRATE'S CRIMINAL APPEAL.

T. E. Atkinson for appellant.

J. N. Kilner (D. P. P.) for respondent.

Callow J. : — This is an appeal from the Court of the Magistrate Malacca against the convictions and sentences of 4 months rigorous imprisonment imposed on the 13th of October, 1947, for an offence contrary to section 411 of the Penal Code.

There were two charges — they read as follows :—

(1) That you on or about 2nd August 1947 at 12.30 a.m. at Klebang, Ayer Itam, Malacca, dishonestly retained stolen property to wit:—

One Black Leather Brief case,
One White handkerchief

belonging to one, Lt. Col. P. F. White, having reason to believe the same to be stolen property, and that you thereby committed an offence punishable under Section 411 of the Penal Code.

(2) That you on or about 2nd August 1947 at 12.30 a.m. at Klebang, Ayer Itam, Malacca, dishonestly retained stolen property to wit:—

2 Hand bags brown leather.
A box with 6 tennis balls.
1 lighter.
1 tin lobster.
1 table clock.
1 compact.
1 small towel.
1 hand book.

belonging to Lt. Col. Guinness, having reason to believe the same to be stolen property, and that you thereby committed an offence punishable under s. 411 of the Penal Code."

Three persons were charged; against the third accused the Court below held no evidence and he was acquitted; the 1st and 2nd were found guilty. The appellant was the 2nd accused.

At the close of the case for the prosecution Mr. Atkinson who represented the accused, as he does here, submitted no case to answer on the ground that exclusive possession had not been proved. He rested his case on this point, so the facts must be taken from the evidence of the prosecution witness.

The grounds of appeal are :—

1. The Learned Magistrate mis-directed himself to the facts by finding that Your Petitioner had lived since the re-occupation in the house in which the stolen property in question was found. There was no evidence before the Court to warrant this finding, and prosecution witness 5 did not depose that such was the case.

2. The Prosecution failed to prove that the property in question was in the "exclusive possession" of Your Petitioner as in law the prosecution must prove, and the convictions are therefore bad in law.

As regards Ground 1 the notes of the evidence of the 5th Prosecution Witness reads :—

. . . . There is a house adjacent to mine . . . . My son lives in the house now, he is Goh Koon Peng. He is accused No. 2. He has lived there since the re-occupation. No one else lives there.

The witness was not cross-examined.

It is true that the evidence does not directly state that this house is the one in which the stolen property was found, but reading the record as a whole there is not the slightest doubt of it. The Magistrate is a busy man with occupations other than Judicial, nor has he legal qualifications; he has some discretion as to the record and notes of evidence, but clearly it was an omission to record specifically that this house was the one in which the incident occurred, the note of evidence is incomplete. Learned Counsel for the appellant in his submission in the Court below (page 11 of the record) appears not to have queried the connection of the house described by the 5th witness Tan Chuan with the appellant and the finding of the stolen property, and the Magistrate in his grounds of judgment (page 14) makes open reference to the appellant living in

the house in which the stolen property was discovered. The omission on the record did not apparently occur to the Court below; that it was the house in which the property was found, and that the appellant dwelled therein was assumed. No possible miscarriage of justice or disadvantage to the appellant resulted in consequence of this point which I am satisfied was fully appreciated by all concerned in the Court below.

Ground 1 fails.

The important and interesting ground, argued ably by Mr. Atkinson for the appellant, is Ground 2. It deals with the often discussed subject of possession.

Each case depends on the particular facts adduced, and naturally each is different. It is hard to generalise although certain principles are fundamental. Possession may be physical or constructive, absolute or joint (9 *Halsbury's* 2nd Edn. para. 938). In this case the Magistrate held that it was joint. It must also be noted that in this case the charge is for retaining, not receiving, but I do not think it necessary to go into the distinction between the two words, for the same principles apply as to possession.

It is now necessary to set out the facts found in the Court below and to consider and decide if such facts warrant the finding recorded, in other words, whether such facts support the conviction on joint possession.

Acting on information the Police went by night to the house. Entrance was demanded, and from inside scuffling was heard and flashes seen as if from a torch; from the opposite side of the house came the noise of wood being broken. Entrance was not accorded and the Police forced the door.

Going in there appeared no sign of life and search commenced. Then the 1st accused was found hiding under a bed; he was arrested, and at that time the attention of the Police was drawn to a noise from above. Flashing a torch the 2nd accused (now the appellant) was seen "Up by the roof with feet on a rafter and grasping a pole" (pages 3/4 of record). He was taken into custody.

In the room were found exhibits P 1 to P 6 and P 13; and in the next room were found exhibits P 7 to P 11. All these articles were identified and claimed by witnesses from whom they had been stolen a few days earlier.

Thus to summarise, the appellant was found hiding in the roof of the room in which exhibits P 1 to P 6 and P 13 were found, and in the next room were discovered exhibits P 7 to P 11. In the grounds of judgment the Magistrate found as fact that the appellant lived in the house and had lived there since the re-occupation.

Mr. Atkinson for the appellant argued that these circumstances were insufficient to sustain the finding. He submitted that possession must be exclusive, unless conspiracy or common intention is proved. I think his argument that mere presence in a house where stolen property is found cannot amount to possession is unanswerable. He cited several cases — *R. v. Cordy*[1], *R. v. Wiky*[2], *Queen-Empress v. Muhamed Ali Shet*[3], *Ram Charan*[4], *Bashir Ahmad*[5], *R. v. Flatman*[6], but unfortunately none could be produced, the Library not having recovered from the depredations of the occupation. The only one of which there is an outline is *R. v. Cordy* in the 5th Edition of *Russell* pages 843/4, but the case does not assist me. It concerned the physical possession of a stolen shirt passed to her by another. Here I am concerned with possession joint and constructive.

It is clear, furthermore, that where property is found in a house in the possession of more than one inmate, none of them could be said to be in possession of it unless there is some evidence of conscious control (*Gour* 5th Ed. page 1399). There is no doubt the facts support a charge of assisting in the concealment of stolen property contrary to section 414 of the Penal Code, or of harbouring — this Mr. Atkinson conceded, but he submitted there is not sufficient evidence of exclusive control to justify conviction on the charge as it stands.

Mr. Kilner for the respondent argued that on the facts possession must have been joint. He cited 16th Ed. *Ratanlal* p. 1012 :—

> "Where the accused, along with several others, was found in the house of one of them, quarrelling over the division of certain stolen property . . . it was held that the accused was in possession . . ."

and rightly convicted. It will be observed that in that case it was not an essential point as to which of the accused was the house owner or occupier.

Now in my view all depends on the circumstances of the case and it becomes largely a question of fact. "Where stolen property is found in a man's house the question as to whether it was there with his knowledge and sanction is a question for the jury" (*R. v. Savage*[7]). Was this property in the joint possession of the appellant? There was no evidence of the relationship of the appellant with the 1st accused in the Court below, and the question of whether possession was sufficiently attributed to the appellant is one dependent upon the proved circumstances of the case (5th Ed. *Gour* Vol. I, 816).

Had the appellant as occupier of the house such control over it as to prevent anything coming in, or being taken out without his sanction (5th Ed. *Gour* Vol. I, 815)? It would appear from the nature and number of the exhibits that he must have had cognisance of them (*R. v. Hari*[8], *Emp. v. Budh Lal*[9]), but even presuming this postulate against the appellant the case must be taken further to sustain the conviction.

I think the fact that the Police had to break in does take it one step further. It meant the appellant was in premises secured from within, and in the room in which he was found was discovered also property recently stolen.

The best proposition of law appropriate to this case which I have at my disposal is contained in *Woodroffe's Evidence* 9th Edition page 803, note (4):—

> The finding of stolen property in the house of the accused, provided there were other inmates capable of committing the larceny is of itself insufficient to prove his possession; though if coupled with proof of other suspicious circumstances, it may fully warrant the conviction of the accused.

If the property had simply been discovered in the house occupied by the appellant, with no other circumstances of suspicion it is manifest that no conviction could have ensued. I think, after reference to such authorities as are here available, that there is a clear distinction to be drawn between a person in whose house stolen property is found unaccompanied by any other proved act or conduct of such person, and whose acts and conduct coupled with surrounding circumstances arouse irresistible conclusions of guilt in connection with the receiving or retaining of such property.

Here is a man whose door is barred to the Police, who is found hiding in the roof above property stolen a few days before. Was his conduct and were such circumstances compatible with conscious and voluntary possession?

On the evidence of witnesses seen and heard in the Court below the Magistrate held there was sufficient evidence for the appellant to be called upon for his defence; thereupon the appellant rested his case and the convictions followed.

I agree with the Magistrate. I find the surrounding circumstances sufficient to show a *prima facie* case of joint possession. I therefore consider there is insufficient ground for interfering and dismiss the appeal.

As regards sentence I have been exercised as to its leniency. Those who receive, retain, harbour or assist thieves merit exemplary punishment, for the conduct is conducive to crime in others. In my opinion in the conditions now prevailing more severe sentences are necessary, and I shall have to consider gravely my powers of enhancing sentences on any future occasion.

Appeal dismissed.

Re ALLAPITCHAY RAWTHER, DECD.; KADER BATCHA RAWTHER v. SYED AHMAD & ANOR.

[O. C. J. (Bostock-Hill J.) March 5, 1948]

[Penang — Originating Summons No. 164 of 1947]

Practice and Procedure — Civil Law Ordinance (Cap. 42), s. 3(f) — Application to stay suit — Suits commenced in different countries.

In this Summons, the plaintiff as sole surviving executor of the will of the deceased asked for his accounts to be taken in the Court. The 1st defendant was the attorney of the plaintiff from 1941 to 1947. In 1946 the 2nd defendant had filed a suit in Tanjore claiming an account of the Penang estate of the deceased. It was argued for the defendants that the Court should direct a stay of the proceedings until the determination of the Indian suit.

Held: the defendants had not shown that the proceedings were vexatious or oppressive and therefore the Court was unable to exercise its jurisdiction to stay the proceedings.

Cases referred to:—

(1) *Bayley v. Edwards* (1792), 36 E.R. 1029
(2) *Ostell v. Le Page* (1852), 42 E.R. 1121.
(3) *Thornton v. Thornton* (1886), 11 P.D. 176.
(4) *Mutrie v. Binney* (1887), 35 Ch. D. 614.
(5) *Logan v. Bank of Scotland* (1906) 1 K.B. 141.
(6) *Egbert v. Short* (1907) 2 Ch. 205.
(7) *Cohen v. Rothfield* (1919) 1 K.B. 410.
(8) *The London* (1931) P. 14.
(9) *St. Pierre v. South American Stores* (1936) 1 K.B. 382.
(10) *McHenry v. Lewis* 22 Ch. D. 397.

ORIGINATING SUMMONS.

E. D. de Buriatte for the plaintiff.

R. D. Hume for the defendants.

Bostock-Hill J. : — This Originating Summons came up for argument in open Court having been adjourned from Chambers for that purpose. The facts are as follows :